

**STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS**

Nancy Stuhlman, d/b/a Auto Service Know How,
and Brad Ingersoll,

Appellants,

vs.

PECFA Claim #53072-5215-43

Secretary, DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,
Respondent.

FINAL DECISION

Pursuant to a petition filed December 29, 1993, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on October 31, 1994, at Milwaukee, Wisconsin.

The issue for determination is whether the department's decision denying Petroleum Environmental Cleanup Fund (PECFA) reimbursement in the amount of \$6,576.50 was reasonable.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Appellants Stuhlman and Ingersoll, by

Attorney Michael P. Herbrand
Houseman, Feind, Gallo & Malloy
P.O. Box 104
Grafton WI 53024-0104

Department of Industry, Labor and Human Relations
Division of Safety and Buildings, by

Attorney Kristiane Randal, Assistant General Counsel
P O Box 7946
Madison WI 53707-7946

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated October 20, 1995.

The Hearing Examiner issued a proposed decision in this case dated April 6, 1995. The parties were given 20 days to file objections. Ms. Randal filed objections to the proposed decision. Having considered the proposed decision and the objections, the matter is now ready for final decision.

ORDER

The Proposed Decision dated April 6, 1995, is hereby adopted as the final decision of the department with the following modifications:

To the extent that the proposed findings of fact contain either a recitation of evidence or a discussion of the evidence, those elements of the proposed findings are adopted as opinion rather than as findings of fact.

The seventh, eighth and ninth sentences of proposed finding #6 are replaced by the following: "The effective date of the emergency rule was January 1, 1993. It should be applied to all activities on or after that date, including both work performed on a site and claims filed regarding a site, except where the rule expressly provides another effective date."

The word "not" is deleted from proposed conclusion of law #4.

The final sentence of the proposed decision is modified to provide that the applicant is entitled to additional reimbursement in the amount of \$2,242.50, together with applicable loan interest charges, and the balance of the reimbursement sought by the applicant is denied.

DISCUSSION

The modification made to the proposed decision reflects my conclusion that §ILHR 47.30(l)(f), Wis. Adm. Code, which imposes a \$500 limit on reimbursement for PECFA claim preparation costs, was intended to apply to all claims filed after its effective date.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel, 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Signed and dated in Madison, Wisconsin this 10th day of
November, 1995.

Richard Wegner, Deputy Secretary
Department of Industry, Labor & Human Relations
P O Box 7946
Madison WI 53707-7946
Telephone: 608-266-7552
Facsimile: 608-266-1784

cc: Parties in Interest

**STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS**

**IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by**

MILWAUKEE HEARING OFFICE
819 N 6th Street
Room 382
Milwaukee, WI 53203
Telephone: (414) 227-4416
Fax: (414) 227-4264

Ms. Nancy Stuhlman, d/b/a Auto Service Know How, and Mr. Brad Ingersoll

Re: PECFA Claim # 53072-5215-43

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the Proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Patrick J. Osborne, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING OFFICER:

DATED AND MAILED:

WILLIAM D. MCKEOWN

April 6, 1995

MAILED TO:

Appellant Agent or Attorney

Department of Industry, Labor
and Human Relations

Attorney Michael P. Herbrand
Houseman, Fiend,,Gallo & Malloy
P.O. Box 104
Grafton, Wisconsin 53024-0104
(414) 377-6080

Attorney Kristiane Randal
Assistant General Counsel
P.O. Box 7946
Madison, WI 53707-7946
(608) 267-4433

On December 7, 1993, the Department of Industry, Labor and Human Relations issued an appealable order denying Auto Service Know How reimbursement in the amount of \$28,952.94 under the PECFA program. Auto Service Know How filed a timely appeal from such denial on December 29, 1993. A hearing pursuant to that appeal was held on October 31, 1994 at Milwaukee, Wisconsin, before Administrative Law Judge William b. McKeown, acting as a state Hearing officer.

Based on the applicable records and evidence in this case, the state hearing officer makes the following

PROPOSED FINDINGS OF FACT

1. At all times material, Ms. Nancy Stuhlman (hereinafter applicant) was the legal owner of the premises located at W279 N2243 Prospect Drive, Pewaukee, Wisconsin where a petroleum distribution business was operated. Also at all times material, Kr. Brad Ingersoll (hereinafter applicant), was the owner of RTT Excavation Services, located at 11112 North Port Washington Road, Mequon, Wisconsin, and is a proper party hereto as the legal agent of Nancy Stuhlman in this matter.
2. On or about February 19, 1993, the applicant filed a claim for reimbursement of expenses associated with site cleanup at the first premises identified in paragraph 1 in the total amount of \$89,437.44. The Department of Industry, Labor and Human Relations (hereinafter the department) made reimbursement thereafter to the applicant in the amount of \$57,984.50.
3. The applicant appealed denial of the following elements of the initial claim:
 - a) \$700.00 for costs for daily mobilization of equipment at the job site.
 - b) \$2,634.00 for travel costs to and from the work site.
 - c) \$1,000.00 for clerical fees incurred in preparation of the PECFA application.
 - d) \$2,242.50 for groundwater removal costs.
4. Itemized invoices submitted by the applicant for seven days of on-site work claimed \$50 each day for mobilization of equipment and supplies, and \$50 each day for demobilization of equipment and supplies. No testimony was presented by the applicant, nor was it argued in the briefs of the parties, that the time actually spent for performing such activities was identified or submitted; the applicant claimed such reimbursement based on a flat fee estimation of the effort expended. Such method of claiming differed from the time itemization submitted by the applicant for "labor" charges incurred by staff performing remediation work on site. The department denied reimbursement for the mobilization and demobilization charges on the basis that such amount did not represent "actual costs" for remediation activity envisioned by section 101.143(4)b of the Wisconsin Statutes. The applicant contends that such a distinction in the manner of claiming this item of reimbursement amounts to a distinction over form, rather than substance. However, one of the implied purposes of having all PECFA claims audited and investigated prior to payment is to verify that all amounts claimed are valid expenditures of effort in furtherance of PECFA goals. It is not an unreasonable requirement under such theory to demand that applicants for reimbursement document precise costs per worker, both as to time and activities. Moreover, the department did not deny the reimbursement sought hereunder until permitting the applicant a second opportunity to validate the item claimed. In a document

tendered to the department in response to such request for validation (exhibit 4, page 2 record), the applicant made only general statements of activity required, and itemized the time necessary as "approximately one hour...: Given the conceded differences in amount and types of equipment brought to and from the job site each day, the documentation presented by the applicant for mobilization and demobilization expenses does not meet the requirement of showing actual cost to the applicant. The department acted reasonably in permitting reimbursement for mobilization on a onetime basis at the "front end" of the cleanup and demobilization on a one-time basis upon evacuation of the equipment from the site.

5. The applicant claimed 12 hours of travel time per day for four individuals working on site, specifying that each one-way trip took one and one-half hours to accomplish. The testimony submitted by the department estimated the one way distance as thirty miles; the applicant asserted that it was required, based on varying routes utilized to the job site, to travel thirty-seven miles one way. The applicant further contended that a portion of non-travel time to which it was entitled to reimbursement was attributable to daily fueling of two separate vehicles. The PECFA program limits reimbursement of applicants to labor time spent productively in remediation activities. The appeal tribunal is not persuaded that the applicant was required, under any reasonable routs of march, to travel one and one-half hours to reach the job site, rush hour traffic, road conditions, etc., notwithstanding. Moreover, the daily fueling of vehicles traveling, at most, one hundred miles per day, is suspect. At the least, the refueling time was non-productive time, and the PECFA fund should not be required to subsidize these overhead costs. While the department's brief urges deletion of all travel costs from the claim submitted, including those already allowed at forty-five minutes per worker, per one-way trip, the appeal tribunal concludes that transportation to remote work sites is and was a viable item of customary expense envisioned as reimbursable by the PECFA legislation. As opposed to the estimation of expenses covered in paragraph 4, above, the travel costs claimed herein lend themselves to reasonable estimation by the reviewer. The department's estimate of forty-five minutes in travel time each way was a reasonable decision on its part as to the reimbursement required.
6. There was no dispute between the parties that the applicant incurred labor costs of \$1,500 in collating, assembling and drafting the various documents necessary to file its initial claim. The claim was filed on February 19, 1993. An emergency rule effective January 1, 1993 limited reimbursement for claim preparation to \$500.00. The testimony established that all clerical costs to prepare the claim were "incurred" before January 1, 1993. The applicant asserted that the date the clerical costs were incurred should control over the date the claim was filed for purposes of determining whether the \$500 cap should apply. Neither party has cited language in the emergency rule or applicable statute establishing that the date of claim filing controlled for purposes of determining reimbursement hereunder. There is language elsewhere in ILHR 47, specifically in the area of determination of deductibles, which ties the amount of deductible to the date the claim is filed (ILHR 47.34). Lacking any limitation in applicability, there is no apparent distinction between the clerical costs incurred and the remedial activities performed on site, for reimbursement purposes. Accordingly, the applicant should be allowed full reimbursement for its clerical expenses herein.
7. The department denied the groundwater cleanup expense claimed by the applicant for removal of groundwater from the site on April 8, 1992. On the matter of the denial of reimbursement for groundwater removal, the department raises a threshold question of whether sworn testimony presented by the applicant at the hearing should be considered on an estoppel theory that the information was arguably available to the applicant at the time of an additional information request following the initial claim submission, and was not provided at that time. However, as the

applicant has correctly pointed out in its rebuttal brief, the provisions of Chapter 227 governing administrative hearings are not so limiting. The purpose of a hearing is to permit full disclosure, confrontation between adverse interests, and hopefully, a reasoned decision based on all relevant facts. The department has not shown any legitimate purpose of the PECFA system which would be undermined by payment of this item of cost, if legitimate, albeit after hearing. As to the issue itself, department contended that the amount for groundwater cleanup was properly denied as having been attributable to the applicants' negligence in redamaging a known drain tile on the site. However, the great weight of the firsthand testimony linked the cleanup expense disallowed with a similar expense allowed from April 22, 1992. It was not established that there was any negligence on the part of the applicant with regard to the presence of groundwater on the site on April 8, 1992. The \$2,242.50 was an allowable expense incident to legitimate remedial activity on the site.

PROPOSED CONCLUSIONS OF LAW

1. The applicants are the owners or agents of a property covered by the remedial provisions of section 101.143 of the Wisconsin statutes.
2. The sum of \$700.00 for mobilization and demobilization costs incurred were properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143 (4) of the Wisconsin Statutes, and chapter ILHR 47.30 (2) (a) 15 of the Wisconsin Administrative Code.
3. The sum of \$2,634.00 for travel costs was properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143 (4) of the Wisconsin Statutes, and Chapter ILHR 47.30(2)(a)15 of the Wisconsin Administrative Code.
4. The sum of \$1,000.00 for clerical expenses was not properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143 (4) and chapter ILHR 47.30 (1) (f) of the Wisconsin Administrative Code.
5. The sum of \$1,950.00 for groundwater removal, with its incident 15% markup, was not properly deleted from the amount reimbursed to the applicant, within the meaning of section 101.143(4)(b) of the Wisconsin Statutes, and chapter ILHR 47.30 of the Wisconsin Administrative Code.

PROPOSED DECISION

The department's decision denying reimbursement to the applicant is modified to conform to the above findings, and as so modified, is affirmed. Accordingly, the applicant is entitled to additional reimbursement in the amount of \$3,242.50, together with applicable loan interest charges. The balance of the reimbursement demanded by the applicant is denied.

WILLIAM D. MCKEOWN,
State Hearing officer